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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
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6 DESIREA A. GETSINGER,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Commissioner
10 of Social Security Administration,
11 Defendant.
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NO. 1:14-cv-03127-SAB

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

16 Before the Court are Plaintiff's Motion for Summary Judgment, ECF No.
17 13, and Defendant's Motion for Summary Judgment, ECF No. 20. The motions
18 were heard without oral argument. Plaintiff is represented by D. James Tree.
19 Defendant is represented by Assistant United States Attorney Pamela De Rusha
20 and Special Assistant United States Attorney John C. LaMont.

21 **I. Jurisdiction**

22 On June 2, 2011, Plaintiff filed applications for disability insurance benefits
23 (DIB) and supplemental security income payments (SSI). Plaintiff alleged she is
24 disabled beginning September 10, 2002,¹ due to conditions including bipolar
25 disorder, anxiety, PTSD, and Asthma.
26 _____

27 ¹ In her response, Plaintiff amended her onset date to June 1, 2010 to conform to
28 the evidence from her treating source. ECF No. 13 at 29.

1 Her application was denied initially on September 12, 2011, and again
2 denied on reconsideration on October 13, 2011. A timely request for a hearing was
3 made. On March 8, 2013, Plaintiff appeared and testified at a hearing held in
4 Spokane, Washington before Administrative Law Judge (ALJ) Virginia Robinson.
5 Trevor Duncan, vocational expert, also appeared and testified. Plaintiff was
6 represented by attorney Chad Hatfield.

7 The ALJ issued a decision on March 15, 2013, finding that Plaintiff was not
8 disabled. Plaintiff timely requested review by the Appeals Council, which denied
9 her request for review on July 3, 2014. The Appeals Council's denial of review
10 makes the ALJ's decision the final decision of the Commissioner. 42 U.S.C.
11 §405(h).

12 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern
13 District of Washington on September 2, 2014. The instant matter is before this
14 Court pursuant to 42 U.S.C. § 405(g).

15 **II. Sequential Evaluation Process**

16 The Social Security Act defines disability as the "inability to engage in any
17 substantial gainful activity by reason of any medically determinable physical or
18 mental impairment which can be expected to result in death or which has lasted or
19 can be expected to last for a continuous period of not less than twelve months."
20 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
21 only if her impairments are of such severity that the claimant is not only unable to
22 do her previous work, but cannot, considering claimant's age, education and work
23 experiences, engage in any other substantial gainful work which exists in the
24 national economy. 42 U.S.C. §423(d)(2)(A).

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Bowen*
27 *v. Yuckert*, 482 U.S. 137, 140-42 (1987).

28 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §

1 404.1520(b). Substantial gainful activity is work done for pay and requires
2 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*
3 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
4 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If she is not, the
5 ALJ proceeds to step two.

6 Step 2: Does the claimant have a medically-severe impairment or
7 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not
8 have a severe impairment or combination of impairments, the disability claim is
9 denied. A severe impairment is one that lasted or must be expected to last for at
10 least 12 months and must be proven through objective medical evidence. 20
11 C.F.R. § 404.1508-09. If the impairment is severe, the evaluation proceeds to the
12 third step.

13 Step 3: Does the claimant's impairment meet or equal one of the listed
14 impairments acknowledged by the Commissioner to be so severe as to preclude
15 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.
16 App. 1. If the impairment meets or equals one of the listed impairments, the
17 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
18 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

19 Before considering Step 4, the ALJ must first determine the claimant's
20 residual functional capacity. 20 C.F.R. § 404.1520(e). An individual's residual
21 functional capacity is her ability to do physical and mental work activities on a
22 sustained basis despite limitations from her impairments.

23 Step 4: Does the impairment prevent the claimant from performing work she
24 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant is able to
25 perform her previous work, she is not disabled. *Id.* If the claimant cannot perform
26 this work, the evaluation proceeds to the fifth and final step.

27 Step 5: Is the claimant able to perform other work in the national economy
28 in view of her age, education, and work experience? 20 C.F.R. § 404.1520(g).

1 The initial burden of proof rests upon the claimant to establish a prima facie
2 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
3 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
4 mental impairment prevents her from engaging in her previous occupation. *Id.* At
5 step five, the burden shifts to the Commissioner to show that the claimant can
6 perform other substantial gainful activity. *Id.*

7 **III. Standard of Review**

8 The Commissioner's determination will be set aside only when the ALJ's
9 findings are based on legal error or are not supported by substantial evidence in
10 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
11 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
12 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
13 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
14 evidence is "such relevant evidence as a reasonable mind might accept as adequate
15 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
16 ALJ's denial of benefits if the evidence is susceptible to more than one rational
17 interpretation, one of which supports the decision of the administrative law judge.
18 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
19 support either outcome, the court may not substitute its judgment for that of the
20 ALJ." *Matney*, 981 F.2d at 1019.

21 A decision supported by substantial evidence will be set aside if the proper
22 legal standards were not applied in weighing the evidence and making the
23 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
24 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
25 immaterial to the ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec.*
26 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

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IV. Statement of Facts

The facts have been presented in the administrative transcript and the ALJ's decision and will only be summarized here.

Plaintiff was 26 years old at the time of the hearing. She is married or has a significant other, and has two children. She completed the 7th grade. She testified that school was very difficult for her and around this time, she was spending time in juvenile detention because she was running away from home and was violent toward her mother. When she was 15, she was raped by a stranger at a party. A few years later, she was raped by a friend of her abusive ex-boyfriend. Her mother reported to her that she had been molested when she was an infant, and she has been abused by more than one boyfriend.

She was kicked out of the house when she was 17, and she spent time on the street doing drugs. In 2009, she became pregnant, stopped using drugs, and sought mental health treatment. She has been diagnosed with bipolar disorder, PTSD, depression, and ADHD.

Plaintiff re-experiences her abuse daily, and also has nightmares, flashbacks, and intrusive thoughts, as well as an exaggerated startle response, hypervigilance, sleep disturbances, irritability, concentration problems and panic attacks, lack of energy, and sexual problems. She experiences mood swings and angry outbursts.

She worked at a convenience store—mopping the floors, wiping down the machines, and pushing items forward on the shelf. Generally, she worked about an hour a day. After new owners purchased the store and increased her hours and responsibilities, she had problems related to her anger and mood swings, and eventually had an episode where she blew up at the owners and quit.

Plaintiff does not have a driver's license. She was unable to pass the written test. She is not comfortable going outside of her house by herself. If she takes her kids to the park, her significant other, sister, or mother accompanies her. She

1 rarely goes to family dinners or holiday occasions because there are too many
2 people.

3 **V. The ALJ's findings**

4 The ALJ found Plaintiff met the insured status requirement of the Social
5 Security Act through June 30, 2012.

6 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
7 activity since September 10, 2002. (Tr. 21.)

8 At step two, the ALJ found Plaintiff has the following severe impairments:
9 attention-deficit hyperactivity disorder (ADHD), major depressive disorder, post-
10 traumatic stress disorder (PTSD), and borderline personality traits. (Tr. 21.)

11 At step three, the ALJ found that Plaintiff's impairments or combination of
12 impairments do not meet or medically equal Listing 12.02 (Organic Mental
13 Disorders), 12.04 (Affective Disorders), 12.06 (Anxiety-related Disorders), and
14 12.08 (Personality Disorders). (Tr. 22.)

15 The ALJ concluded that Plaintiff has the residual functional capacity to
16 perform a full range of work at all exertional levels but with the following
17 nonexertional limitations: the claimant is limited to simple, routine tasks; and is
18 limited to occasional and superficial interaction with the public. (Tr. 24.)

19 At step four, the ALJ found that Plaintiff had no past relevant work. (Tr.
20 29.)

21 At step five, the ALJ found there were jobs that exist in significant numbers
22 in the national economy that Plaintiff can perform. (Tr. 29.) The ALJ relied on the
23 testimony of a vocation expert, and concluded that Plaintiff was capable of
24 performing the requirements of representative occupations such as vehicle cleaner,
25 hand packager, and janitor. As such, the ALJ concluded that Plaintiff was not
26 disabled from September 10, 2002 through March 15, 2013.

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VI. Issues for Review

1. Did the ALJ commit reversible err in rejecting the opinions of Plaintiff's treating and examining medical sources?

2. Did the ALJ commit reversible error in rejecting lay witness statements?

3. Did the ALJ commit reversible error in finding Plaintiff not credible?

VII. Discussion

1. Medical Opinions

The ALJ is tasked with resolving conflicts in the medical evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Generally speaking, three types of doctors provide medical evidence: treating doctors, examining doctors, and reviewing (non-examining) doctors. "By rule the Social Security Administration favors the opinion of a treating physician over non-treating physicians." 20 C.F.R. § 416.927²; *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). "If a treating physician's opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case record, it will be given controlling weight." *Orn*, 495 F.3d at 631. If a treating physician's opinion is not given "controlling weight" because it does not meet these requirements, the ALJ should consider (i) the length of the treatment relationship and the frequency of examination by the treating physician;

² 20 C.F.R. § 416.927(c)(2) states: Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.

1 and (ii) the nature and extent of the treatment relationship between the patient and
2 the treating physician in determining the weight it will be given. *Id.* The ALJ is
3 not required, however, to merely accept the opinion of a treating doctor. *Lester v.*
4 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where contradicted, the ALJ may reject
5 the opinion for specific and legitimate reasons that are supported by substantial
6 evidence in the record. *Id.* On the other hand, where the treating doctor's opinion
7 is uncontradicted, the ALJ can only reject it for clear and convincing reasons. *Id.*

8 The opinions of examining physicians are afforded more weight than those
9 of non-examining physicians. *Id.* Factors the ALJ should consider in evaluating
10 any medical opinion (not limited to the opinion of the treating physician) include:
11 (1) the amount of relevant evidence that supports the opinion and the quality of the
12 explanation provided; (2) the consistency of the medical opinion with the record
13 as a whole; (3) the specialty of the physician providing the opinion; and (4) other
14 factors, such as the degree of understanding a physician has of the
15 Administration's disability programs and their evidentiary requirements and the
16 degree of his or her familiarity with other information in the case record. *Orn*, 495
17 F.3d at 631. When evaluating conflicting medical opinions, an ALJ need not
18 accept the opinion of a doctor if that opinion is brief, conclusory, and inadequately
19 supported by clinical findings. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
20 2005).

21 The ALJ relied on the following medical professionals in issuing her ruling;
22 (1) Dr. Mary Pellicer, M.D., consultative examiner; (2) Jesse McClelland, M.D.,
23 consultative examiner; (3) Dr. James Bailey, State Agency psychological
24 consultant; (4) Dr. Diane Fligstein, State Agency psychological consultant; and (5)
25 Kathleen Mack, ARNP, treatment provider.

26 The medical providers who treated or examined Plaintiff concluded that she
27 was unable to sustain full-time employment. The ALJ gave these provider's
28 opinions some, little, or no weight. The State Agency consultants who conducted a

1 review of the record, but never examined Plaintiff, concluded that she is capable
2 of understanding and remembering simple instructions and directions, and is able
3 to maintain concentration, persistence and pace for routine tasks, as well as
4 tolerate cursory contact with the public and coworkers and can accept supervision
5 delivered in a normative fashion. The ALJ gave great weight to the opinions of the
6 State Agency consultants.

7 The ALJ erred in giving more weight to the non-examining medical sources
8 than to the examining and treating sources. The opinion of a non-examining
9 physician cannot by itself constitute substantial evidence to reject the opinion of a
10 treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830-1 (9th 1995).

11 Also, the ALJ failed to provide legitimate reasons for rejecting the opinions
12 of Dr. McClelland, Dr. Pellicer, and Ms. Mack, all of whom opined that Plaintiff
13 has severe psychiatric symptoms resulting in significant functional limitations.
14 The ALJ's reasoning as set forth in her opinion suggests that she has a
15 misunderstanding of, and possibly a total disregard for, the nature of Plaintiff's
16 psychiatric impairments. Plaintiff's "overriding problem" is her PTSD, which
17 "affects her ability to be around people and has made her more and more fearful of
18 being outside her home." (Tr. 388.) She testified that when she is at home with the
19 kids, the blinds are down for most of the time because she does not like people
20 watching her. (Tr. 51) She cannot go to the grocery store by herself. (Tr. 51-52.)
21 She calls her family for help when things get too much for her at home, and her
22 family checks in on her daily. (Tr. 50.) Things build up and violence seems like
23 the answer. (Tr. 50.). She has panic attacks and severe anxiety when in public and
24 around other people. (Tr. 384). Consequently, Plaintiff's symptoms impact her
25 functioning in public places, such as a workplace, much more significantly than
26 her functioning at home and around treatment providers who she knows and trusts.
27 The ALJ's reliance on the fact that Plaintiff has the ability to interact appropriately
28 with treatment providers, and the fact that she cares for her children is not

1 sufficient to reject the examining and treating medical source's opinions. *See*
2 *Garrison*, 759 F.3d at 1016 (noting that "impairments that would unquestionably
3 preclude work and all other pressures of a workplace environment will often be
4 consistent with doing more than merely resting in bed all day.").

5 Additionally, Dr. Pellicer's opinion is entitled to more weight than a non-
6 examining opinion. The ALJ's reasons for rejecting Dr. Pellicer's opinions are not
7 legitimate. Dr. Pellicer is a medical doctor, who is qualified to give an opinion
8 regarding Plaintiff's mental health and ability to work. More importantly, Dr.
9 Pellicer's opinion is consistent with Dr. McClelland's opinion.

10 Also, the ALJ erred in summarily rejecting Ms. Mack's treating opinion
11 without considering that Ms. Mack, a psychiatric nurse practitioner, "qualified as
12 an 'other source[]' that can provide evidence about 'the severity of [a claimant's]
13 impairment(s) and how it affects [the claimant's] ability to work. *Garrison*, 759
14 F.3d at 1014-15 (citing C.F.R. § 404.1513(d)).

15 **2. Lay witness Testimony**

16 The ALJ improperly ignored several statements made by Albin Chmielinski,
17 Plaintiff's significant other. It was improper for the ALJ to give great weight to
18 Mr. Chmielinski's statements that bolstered her ultimate conclusions, while at the
19 same time completely ignoring the most relevant portions of his report. Moreover,
20 Mr. Chmielinski's report, taken as a whole, supports the conclusion that Plaintiff
21 cannot sustain work-like activities over a full-time schedule.

22 **3. Plaintiff's Credibility**

23 In making her ruling, the ALJ found that Plaintiff's statements concerning
24 her limitations were not credible.

25 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
26 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
27 evidence of malingering, the ALJ must give "specific, clear and convincing
28 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*

1 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted). If the ALJ's
2 credibility finding is supported by substantial evidence in the record, the
3 reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278
4 F.3d 947, 959 (9th Cir. 2002). In recognition of the fact that an individual's
5 symptoms can sometimes suggest a greater level of severity of impairment than
6 can be shown by the objective medical evidence alone, 20 CFR 404.1529(c) and
7 416.929(c) describe the kinds of evidence, including the factors below, that the
8 ALJ must consider in addition to the objective medical evidence when assessing
9 the credibility of an individual's statements:

- 10 1. The individual's daily activities; 2. The location, duration,
frequency, and intensity of the individual's pain or other symptoms;
- 11 3. Factors that precipitate and aggravate the symptoms; 4. The type,
dosage, effectiveness, and side effects of any medication the
12 individual takes or has taken to alleviate pain or other symptoms;
- 13 5. Treatment, other than medication, the individual receives or has
received for relief of pain or other symptoms; 6. Any measures other
14 than treatment the individual uses or has used to relieve pain or other
symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20
15 minutes every hour, or sleeping on a board); and 7. Any other factors
concerning the individual's functional limitations and restrictions due
16 to pain or other symptoms.

17
18 SSR 96-7P, 1996 WL 374186.

19 The ALJ failed to provide specific, clear and convincing reasons for
20 discrediting Plaintiff's symptom testimony. Plaintiff's 2009 statement that she did
21 not believe she qualified for Social Security disability benefits is not relevant or
22 probative of whether she is or is not disabled, or does or does not suffer from
23 disabling mental impairments. The record also demonstrates that while Plaintiff's
24 symptoms have waxed and waned in the course of treatment, she continues to
25 suffer from severe and chronic PTSD, as well as severe anxiety and panic attacks
26 that rise to such a level that she becomes non-functional. The record simply does
27 not support the ALJ's credibility determination.

1 **VIII. Conclusion**

2 Here, the ALJ erroneously rejected medical opinion evidence and Plaintiff's
3 symptom testimony; if this evidence had been properly credited, Plaintiff would
4 have been found disabled. Consequently, the proper remedy is to remand for a
5 calculation and award of appropriate benefits. *Garrison*, 759 F.3d at 1019-20. A
6 review of the record as a whole creates no serious doubt that Plaintiff is disabled
7 within the meaning of the Social Security Act.

8 Accordingly, **IT IS HEREBY ORDERED:**

- 9 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is **GRANTED**.
10 2. Defendant's Motion for Summary Judgment, ECF No. 20, is **DENIED**.
11 3. The decision of the Commissioner denying benefits is reversed and
12 remanded for an award of benefits.
13 4. The District Court Executive is directed to enter judgment in favor of
14 Plaintiff and against Defendant.

15 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
16 file this Order, provide copies to counsel, and close the file.

17 **DATED** this 22nd day of December, 2015.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive, flowing style.

23 Stanley A. Bastian
24 United States District Judge
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